Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
NOV 10 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Section 309(j) | ) | PP Docket No. 93-253 |
| of the Communications Act | ) | |
| Competitive Bidding | ) | |

To: The Commission

## COMMENTS OF CELLULAR SERVICE, INC.

Cellular Service, Inc, ("CSI"), acting pursuant to paragraph 179 of the Commission's Notice of Proposed Rulemaking, FCC 93-455 (October 12, 1993) ("NPRM"), hereby submits its Comments.

## Introduction

CSI is a commercial mobile service provider that resells cellular telephone services in the state of California.[1] CSI is one of the original five resellers of cellular service that initiated resale service in 1984 at the inception of cellular service offerings in Los Angeles, California. As a small business, CSI is acutely concerned that the FCC's auction rules establish a fair, noncollusive, economic manner of issuing licenses and that the Commission provide for an equitable set aside of 20 MHz and 10 MHz frequency blocks for bid by small businesses, rural telcos, and businesses owned by minorities and

[1] An affiliate of CSI, CellToll, provides interexchange resale services in California and to points outside the state. Both CSI and CellToll hold certificates of public convenience and necessity, as telephone corporations, issued by the California Public Utilities Commission.

women. CSI's recommendations in these Comments are also designed to promote the Commission's and Congress' goals of (1) rapid deployment of new technologies and services to the public; (2) diffuse concentration of ownership of PCS licenses; (3) economic opportunity with minimal costs; (4) open and fair competition; and (5) simplicity in administration, relying on this Commission's and other agencies' procedures and experiences.

I. Bidding

A. Vickery Bidding Should Be Preferred Method

A wide variety of bidding forms -- oral bidding, sealed bid auction, descending bid auctions ("Dutch"), sealed second-bid auctions ("Vickery") and combinatorial bidding -- have been analyzed by the NPRM, which tentatively concluded that oral bidding should be utilized unless another form of bidding is specified. CSI believes that the Vickery method should be the procedure generally employed. The Vickery method, as the NPRM notes, has advantages that singularly outweigh the other suggested methods. It awards the license to the party that values it the most; it is resistant to collusion; and it induces bidders to reveal the maximum amount they are willing to pay.

B. Proposals To Avoid Excessive Concentration of Licenses

In its Second Report and Order, FCC 93-451 (October 22, 1993), the Commission observed that Congress directed the Commission to institute safeguards that "will promot[e] economic opportunity and competition and . . . avoid excessive concentrations of licenses by disseminating licenses among a wide variety of applicants . . . ." Id. at para. 11. The Commission must therefore avoid concentration of control of PCS licenses in the hands of a few large corporations and their affiliates. To that end, the Commission should prohibit any party from owning more than one license in an MTA, and any winner of the MTA Block A or Block B license should be precluded from owning BTA licenses in that MTA. To avoid any inequity, cellular licenses should be precluded from obtaining any PCS licenses in their respective MSAs or RSAs.

Similarly, to prevent any undue aggregations by the existing dominant cellular carriers (those that cover over 5 percent of the Nation's POPs), the Commission should adopt the NPRM's proposal to prohibit such carriers from bidding on either the A block or the B block within their respective MSA or RSA. This approach would allow new entrants into the mobile service market to bid against each other rather than against entrenched cellular interests that may have an interest in retarding, rather than expediting, PCS growth.

There is historical precedent for the NPRM's proposal. During the 1970's, when broadcasting was the predominant mass media and cable television was viewed as a mere stepchild, broadcast companies which had cable interests that were grandfathered in the same overlapping markets had no incentive to develop their cable systems and, in fact, refrained from building or improving cable television franchises so as not to affect the revenues achieved through AM-FM-TV combinations. As a result, those cross-owned cable interests were "warehoused" until the Commission began to promote cable television and its technology in the late 1970's and early 1980's. The Commission would be wise to avoid a recurrence of similar warehousing by large facilities-based cellular carriers who have the incentive and capability to suppress or control the growth of PCS in or near their respective MSAs or RSAs.

The Commission should also keep in mind that the dominant cellular carriers have a much lower cost of capital and risk assessment in bidding for PCS licenses since they will be supplementing their existing business and not creating start-up competitors. Moreover, those dominant carriers are already attempting to achieve nationwide licenses through mergers (such as the McCaw/AT&T merger to resell where it has no cellular licenses) and by affiliates of the LECs forming the competing seamless roaming network under the brand name "Mobilink." The NPRM's proposed exclusion of cellular carriers from bidding is not a novel concept. It would be similar to the exclusion of the wireline LECs from applying for the A block cellular licenses.

C. Vickery Procedure Can Be Implemented With Administrative Ease.

Vickery bidding will best support not only diffuse ownership of PCS licenses but also rapid deployment on a fair basis with an opportunity to all parties to bid fairly. The procedure would be as follows:

> 1. The Block A and Block B MTA licenses should be auctioned on a random basis with a simple lottery to pick the geographic order in which MTA licenses are auctioned. All Block A spectrum should be auctioned first. All Block B spectrum should then be auctioned after the aforementioned geographic lottery is conducted again.
>
> 2. Likewise, thereafter, Block C geographic areas should be subject to lottery as to the sequence of auction followed by competitive silent bids, with the same process to occur for auction of Blocks D, E, and F.

By proceeding in the foregoing manner, and subject to the set asides and other restrictions noted below, the Commission would ensure that bidding will be fair, easy to administer and noncollusive. Moreover, spectrum blocks will be awarded in a way that avoids concentration of licenses in the hands of few operators, thus hastening the rapid deployment of PCS services by new competitive providers.

Use of the Vickery method will be of particular utility in awarding MTA licenses. By using a random, rather than geographically sequential basis, bidders will have to focus their efforts on the MTAs which they truly wish to acquire; their bids, therefore, will more likely reflect the maximum value based on a realistic perceived market value estimate, rather than mindless oral auction fever which, even if it produces a higher bid, could lead to default and other problems down the road.[2] In short,

---

[2] If, on the other hand, the Commission still considers oral bidding the preferred option due to a questionable theory of maximizing bids and therefore revenue from the auction, CSI

Vickery will prevent applicants from manipulating an oral auction and facilitate a diffusion of ownership. [3]

II. Set-Asides

The auction legislation requires the implementation of maximum opportunities for small businesses, rural telcos,[4] women and minority owned businesses. The NPRM (at para. 121) proposes set asides of the 20 MHz spectrum block and one 10 MHz spectrum block implemented with an installment payment plan. CSI supports these twin pillars of the set aside proposal would give equal weight to each identified group in the set aside classes and be consistent with the congressional mandate of equal opportunity to bidding for all of these business classes.

By using the Vickery method as proposed by CSI in markets that have been geographically selected at random for bid, a truly fair process will be established that will allow any and all designated set aside classes of bidders the opportunity to receive a license. For purposes of avoiding concentration of control, CSI also agrees that there should be two set aside blocks (20 MHz & 10 MHz) and that the remaining 10 MHz blocks

---

believes oral bidding should be limited to MTA auctions where the larger entities will participate and where there is the least chance that small businesses, rural telcos, minorities and women would not be subject to deliberate or tacit collusion from larger entities.

[3] Any sealed bidder should be allowed to withdraw its bid up to one day before the applicable auction.

[4]CSI supports the current definition of rural telco as set forth under Section 63.58 of the Commission's rules.

should be open to all bidders (except the successful MTA bidders).

Although current SBA guidelines were not adopted for auctions specifically, CSI believes that the benefits of the existing definitions and requirements for classification as a "small business" need not be debated now when the Commission is seeking a way to expedite delivery of new service to the public.[5] Thus, these criteria as they exist for current SBAs should be adopted.[6] Some refinements, however, need to be made to prevent abuse of the set asides. The broadcast playing field is littered with litigation probing the bona fides of two-tiered organizations that were allegedly controlled by minorities and women. That litigation was fostered by the Anax doctrine, which allowed businesses to claim the mantle of being controlled by minorities or women if more than 50 percent of the voting stock or general partnership interests in a limited partnership were owned by minorities or women -- even if those so-called controlling interests represented a minute portion of the company's equity, with the bulk of the equity being held by white males. In countless comparative cases -- with attendant discovery and oral hearings -- it was determined that the

---

[5]CSI supports the present definition of small businesses: net worth not in excess of $6 million with average net income after federal income taxes for the two preceding years not in excess of $2 million.

[6] To a large extent, CSI's Comments are supportive of the "Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding General Docket 90-314," September 15, 1993, Appendix C to the Second Report And Order.

organization's structure was a "sham" and that the white males -- who technically held passive interests as minority stockholders or limited partners -- were in fact in control. E.g. Royce International Broadcasting, 5 FCC Rcd 7063 (1990), recon. denied, 6 FCC Rcd 714 (1991).

The Commission should avoid the broadcast debacle in issuing PCS licenses. Instead, the Commission should adopt a straightforward 50.1% or more total equity and voting right test for inclusion in the set aside class for minorities and/or female ownership. Such a rule will have the further benefit of encouraging parties to use investment vehicles that reflect the actual realities and goals of the organization and avoid the mindless use of limited partnerships and two-tiered corporations purportedly controlled by persons with the "right" gender or ethnic status but who in fact are merely fronts for preference purposes only.

By allowing only true minority-owned and female-owned businesses to compete with the rural telcos and small businesses in the set asides, the Commission can comply with the congressional directive. That directive can also be served if, as the NPRM proposes, the Commission should similarly make all SBAC devices, such as tax certificates and deferred payments, available to all four set aside groups. In that way, all four groups identified by Congress would be treated fairly and equally both at the bidding stage and the implementation stage. To do otherwise may send the Commission down the road of time-consuming -- and unnecessary -- litigation which will delay the issuance of PCS licenses generally and frustrate the Commission's ability to award licenses to any of the four set aside groups.

CSI does not support an "innovator's preference" because it will place the Commission in the untenable position of trying to award further preferences within a class of preferred groups. Indeed, any effort to make further distinction is likely to generate litigation. By treating all four groups within the designated set aside classes equally, any entity which fits within a class should have equal access to financing and the opportunity to bid fairly under the Vickery method.

Finally, the Commission should limit the eligibility of all four set-aside groups to entities in existence as of October 22, 1993, the date of the release of the _Second Report and Order_. This would be consistent with existing SBA rules which presuppose standards of net income for at least two years. _See_ note 6, _supra_. Such a requirement would also serve as a sufficient hurdle to deter non-_bona fide_ minority-owned and female-owned business and speculative business ventures.

## III. _Combinatorial Bidding_

If the Commission implements the noted set-asides as described as well as ownership and bidding limitations, combinatorial bidding becomes less problematic. This is true even if the Commission were to allow oral bidding on the MTAs.

Regardless of which bidding mechanism is used, to promote the opportunity for a wide variety of entities to participate as PCS providers, combinatorial bidding should be limited to one MTA block per geographical area for combined bidders, either aggregately or alone. CSI also agrees with the NPRM that any such combinatorial bid participant should be recluded from bidding on the second MTA block in that same geographical area.

Paragraph 60 of the NPRM proposes to allow a second round of auctioning when a sealed combinatorial bid is higher than the collective individual bids. Although the NPRM is not clear as to which parties would be allowed to participate in the second round sealed bid, it would be ill-advised to afford combinatorial bidders a similar opportunity to raise their bids. Instead, CSI proposes that the individual bidders who tentatively won the spectrum blocks on the first round should be allowed to work collectively to finalize individual second round sealed bids. Such companies should be free to meet together to discuss sources of funding, shared funding arrangements and potential second round bidding strategies.

## IV. Minimum Bid Requirements

CSI supports the NPRM's suggestion that there be no minimum bid requirements. In the absence of any commonly-accepted method for appraising PCS licenses -- which is particularly improbable in light of the various uses for which PCS is suitable -- minimum bid requirements are not sensible.

## V. Alternative Payment Methods

CSI agrees with the NPRM that lump sum payments should be required only for MTAs and that set-aside bidders can utilize either installment payments or royalty payments. In the latter case, a downpayment of 20 percent should be paid with the award of the license, with installments or royalties to be paid each year after the system has been operational for one full year.

CSI supports the existing SBA requirements for both creditworthiness and default purposes and believes that they can be equitably applied to minority and female-owned businesses as well as rural telcos. These requirements have the advantage of a long history of use and can avoid the problems of the Commission trying to craft new policies. The latter risk is particularly significant since the NPRM is on a fast statutory track.

## VI. Performance Requirements

Buildout requirements, as suggested by the NPRM, should be imposed to ensure that only viable entities bid for and receive PCS licenses. The Commission should prohibit PCS licensees from selling the system until it is operational and provides service to at least 10 percent of the population in the licensed area (except in cases, such as bankruptcy or death of a principal, and then the transfer price, as in the case of unbuilt broadcast stations, should be limited to the licensee's prudent and legitimate expenses).

The NPRM summarized many entities' comments regarding the size of the market for PCS. In paragraphs 70 and 73, the NPRM observed that most entities favored the smaller geographic areas (MSAs/RSAs) used in issuing cellular licenses. The Commission favored MTAs/BTAs in order to avoid the kind of consolidation and aggregation of geographical areas which occurred in the cellular industry. Since the Commission has already taken into consideration the future consolidation effects by assigning MTAs/BTAs to PCS service, it should not establish geographic areas larger than an MTA.

The Commission's proposal to use MTAs, however, means that there are relatively few opportunities to hold 30 MHz of PCS spectrum -- which many observers believe is the minimum necessary to compete effectively with existing cellular services. To promote the dissemination of licenses to a wide variety of entities who can compete with cellular licensees, the Commission should not allow an individual company to receive a license in more than one MTA. To further foster diffusion of ownership of PCS licenses, small businesses, women and minority-owned businesses, and rural telcos, should be limited 10 BTA licenses, which approximates the size of one MTA.

Even with the foregoing ownership limitations, there is still a risk that some parties will "warehouse" PCS licenses. To guard against that possibility, the Commission should institute two basic policies. First, there should be no exceptions to the build-out requirements set forth in the NPRM. Second, as explained above, a licensee of an MTA should be prohibited from purchasing another PCS license in the same MTA.

CSI's proposals comport with Congress' paramount goals to diffuse ownership and facilitate the rapid licensing, build-out, and operation of PCS systems. All prospective bidders should be on notice of the strict guidelines and the prohibition against concentration of control in MTAs. Those proposals will foster real, fair competition. Such prohibitions will also encourage only *bona fide* buyers of auctioned properties in the event of default as well as only *bona fide* buyers under the applicable distress sale and tax certificate policies for the set-aside classes.

## VII. Consortia, Collusion & Withdrawal of Sealed Bids

The Commission should make a firm statement that collusive bidding is prohibited and that maximum forfeiture penalties will apply to offenders. As explained above, the easiest way to minimize collusive bidding is to use the Vickery bidding method, along with CSI's suggested seriatim geographic lottery, e.g. Vickery bidding performed at random first for MTAs, then followed by the BTAs. This process could obviate the need for promulgating extensive collusive bidding prohibitions.

A more subtle -- but equally troublesome -- potential may not be susceptible to bright line regulation. The Commission should also prevent dominant facilities-based cellular carriers and LECs from avoiding Commission concentration of control policies by bidding on PCS in MTAs outside their respective service areas and then selling such licenses to other LECs or dominant facilities-based cellular carriers. For example, PacTel Cellular, which has cellular licenses in the southern California MTA, should be precluded from selling or exchanging a PCS license outside southern California to an LEC or cellular carrier for a PCS license in an adjacent MTA. Similarly, affiliates or subsidiaries of dominant carriers or LECs should be subject to the same restrictions as the parent corporation.

Joint bidding by national or regional consortia -- consisting of one company for each MTA and/or BTA in the proposed territory -- should not be considered collusion since such partnerships would promote economic opportunity and dissemination of licenses to a wide variety of applicants. The consortium itself, however, should not be granted the license; rather the individual companies within the consortium should be the licensees.

The consortium should be subject to CSI's proposal to restrict a single party to one MTA license or, in the case of parties applying for the set asides, 10 BTA licenses. Thus, under the sealed bid approach, a consortium should be required to withdraw its sealed bid if the consortium has already received an MTA license in the same MTA. Or, if they have not already received a license as a consortia, the consortium should be allowed to withdraw their bid if the geographical area being auctioned is not their preferred geographical area.

VIII. Application Processing Requirements

CSI agrees with the NPRM that the short form application be submitted with an auction bid and accompanied by the applicable filing fee. However, CSI disagrees with the proposal which would require bidders to simultaneously submit a long application. Such a policy would require the needless expenditure of resources by bidders and the Commission. It should be sufficient to submit the long form application after a party submits the highest bid.

CSI does not quarrel with the letter perfect standard for the short form or applying existing rules to the long form filing. The Commission should extend the applicability of existing rules (just as existing SBA requirements need not be altered from small business definitions). There is no need for the Commission to develop or for bidders to learn requirements which do not improve the process.

IX. Deposits & Other Requirements

CSI supports the NPRM alternative proposal that a payment of 2 cents per MHz per population be calculated as a suitable deposit that should be submitted with any bid and, in turn, placed in an interest-bearing account in favor of the applicant. CSI favors this latter approach over the 20 percent downpayment approach as a suitable threshold that can be applied to all bidders (including set aside *bona fide* bidders). In the event a 20 percent requirement is adopted by the Commission as a general standard, CSI suggests that the 2 cents/per MHz per Pop be applied to set aside groups with the remainder due (under a 20 percent standard) 40 days after issuance of the license becomes a final (meaning that the grant is no longer subject to administrative or judicial review).

## X. Procedure When Tentative Bidder Becomes Ineligible

The Commission should apply petition to deny procedures similar to those used in cellular lotteries. Such petitions would be due after the tentative selectee has won the award and filed the long form application. If a bidder becomes ineligible, the Commission should issue the license to the next highest bid. Only after exhausting the three highest bids should the Commission initiate the auction process all over again. Otherwise, the Commission would unduly expend its resources and delay the initiation of PCS service.

## CONCLUSION

CSI submits that its proposals, if adopted, will allow the Commission to administer the auction process in a fair, economical manner for all bidders, providing an opportunity for previously disadvantaged groups to compete and provide new telephone services to the public.

Respectfully submitted,

Peter A. Casciato
A Professional Corporation
1500 Sansome Street Suite 201
San Francisco, CA 94111
(415) 291-8661

By: ______________________
Peter A. Casciato

Keck, Mahin & Cate
1201 New York Ave., NW
Washington, DC 20005
(202) 789-3400

By: ______________________
Lewis J. Paper

Attorneys for Cellular Service, Inc.

November 10, 1993